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No. 01-488

IN THE

Supreme Court of the United States

TIMOTHY STUART RING,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF ARIZONA

REPLY BRIEF

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To a large extent, the briefs of the State of Arizona and its supporting *amici* are devoted to matters not directly relevant to the issue before the Court. For example, they argue at length that any decision in favor of petitioner should not be applied retroactively. *See* Resp. Br. 36-39; Ariz. Voice for Crime Victims Br. 9-16. That argument, however, has no bearing upon the disposition of this case, which comes to the Court on direct review. *See Griffith v. Kentucky*, 479 U.S. 314 (1987).[1] The State and its *amici* also contend that the Sixth Amendment does not require jury sentencing. *See* Resp. Br. 26; Ala. Br. 12-19. But Petitioner has expressly eschewed the argument that the Sixth Amendment prevents a state from assigning the sentencing decision to the court. *See* Pet. Br. 36. Rather, we contend only that the Constitution requires that the jury find any aggravating circumstances necessary to allow the imposition of a death sentence. *Id.*[2]

When they do turn to the merits of this case, the State and its *amici* make plain that their real quarrel is not with the logic of petitioner's arguments, but instead with the logic of this Court's decisions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and *Jones v. United States*, 526 U.S. 227 (1999).

1. Petitioner accordingly takes no position on the question, except to suggest that the Court may prefer to consider it in a case in which both parties have a stake in its resolution, and can therefore provide "that concrete adverseness which sharpens the presentation of issues." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

2. For this reason, the State's repeated citations to *Clemons v. Mississippi*, 494 U.S. 738 (1990), and *Proffitt v. Florida*, 428 U.S. 242 (1976), and its suggestion that petitioner necessarily urges the overruling of those decisions (*see* Resp. Br. 10-11, 13-14), are also misplaced. In those cases, the juries engaged in the finding of aggravating circumstances.

The opposing briefs provide no reasoned distinction between this case and *Apprendi*, nor any reason to depart here from the Sixth Amendment rule the Court announced there.

I. THIS CASE IS CONTROLLED BY *APPRENDI* AND THE CORE SIXTH AMENDMENT PRINCIPLES ARTICULATED IN THAT CASE.

A. The State's primary argument is that since Ariz. Rev. Stat. Ann. §§ 13-703(A) and 13-1105(C) list death as one of the possible sentences for first degree murder, death is therefore "within the range of punishment available for someone convicted of first-degree murder" and the rule announced in *Apprendi* does not apply. Resp. Br. 9-19. This argument rests entirely on the Court's statement in *Apprendi* that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. Since it views the "statutory maximum" for first degree murder in Arizona as death, the State argues that *Apprendi* does not forbid the State from assigning the duty for finding the facts that increase a defendant's punishment from life to death to a judge. Resp. Br. 8, 14-16.

This argument simply misreads *Apprendi*. The critical holding in *Apprendi* is that the Sixth Amendment jury trial guarantee extends to any factual finding that would "expose the defendant to a greater punishment than that *authorized by the jury's guilty verdict*." 530 U.S. at 494 (emphasis added). It is thus plain that when *Apprendi* refers to the "statutory maximum," it means the maximum sentence that can be imposed under law on the basis of the facts found by the jury, not a greater sentence that can be imposed only if a

judge finds additional "aggravating" facts. The Court expressly stressed the constitutional "novelty of a legislative scheme that removes the jury from the determination of a fact that, if found, exposes the criminal defendant to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.* at 482-83 (emphasis in original). *See also id.* at 499 (the Sixth Amendment guarantees "the right to have a jury determine those facts that determine the maximum sentence the law allows") (Scalia, J., concurring); *id.* at 501, 502, 521 (right to jury trial extends to the finding of "every fact that is by law a basis for imposing or increasing punishment") (Thomas, J., concurring).

At a minimum, therefore, *Apprendi* stands for the proposition that, when State law expressly makes the finding of a particular fact necessary for imposition of a maximum sentence, the Sixth Amendment guarantees a defendant's right to have that fact found by a jury. Here, Arizona's legislature has made a determination, explicitly set forth in its statutes, that capital punishment is not an available option for a defendant convicted of first degree murder unless the State establishes one of ten specific aggravating circumstances. The presence or absence of one of these facts is thus not simply something that a judge may consider in deciding where to sentence a defendant within a statutory "range" authorized by the jury's verdict. Rather, an Arizona judge *cannot* impose the death sentence absent a finding of these factors. *See* Pet. App. 25a-26a. Under both the language and logic of *Apprendi*, the Sixth Amendment jury trial guarantee applies to the finding of such facts.

While the State accuses petitioner of citing too often to the Court's language in *Apprendi* (Resp. Br. 24), its

alternative is to give the Court's statements no effect whatsoever. Moreover, the State's single-minded focus on "range of punishment" is directly contrary to *Jones*. The federal carjacking statute at issue there, 18 U.S.C. § 2119, provided that a person in possession of a firearm who takes a motor vehicle may be imprisoned for "(1) . . . not more than 15 years . . . ; (2) if serious bodily injury . . . results, . . . not more than 25 years . . . and (3) if death results, . . . for any number of years up to life . . ." *See Jones*, 526 U.S. at 230. The "range of punishment" available for a defendant convicted of violating Section 2119 was therefore up to life, but Congress had expressly provided that sentences beyond fifteen years were available only if "serious bodily injury" from use of the firearm was proved, and beyond twenty-five years only if "death result[ed]." In order to avoid the very Sixth Amendment question later decided in *Apprendi*, the Court interpreted this single section of the United States Code as establishing three separate offenses, each of which must be submitted to a jury for its verdict. *See id.* at 251-52.

The statute at issue in *Jones* is indistinguishable from the Arizona statutes at issue here. Like the federal carjacking statute, which allows sentences of more than fifteen years only upon proof of serious bodily injury or death, Arizona law allows punishment for first degree murder in excess of imprisonment for life only upon proof of one of ten specified aggravating factors. This Court suggested in *Jones* – and subsequently expressly confirmed in *Apprendi* – that the Sixth Amendment right to jury trial applies to the Section 2119 aggravating factors of bodily injury or death.[3] The same right to jury trial is applicable to the aggravating circumstances at issue here.

3. *See Apprendi*, 530 U.S. at 490 ("our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*").

More importantly, the State's "range of punishment" argument contravenes core values of the Sixth Amendment. This Court has made plain that a bedrock principle of the Sixth Amendment guarantee of jury trial is that twelve ordinary citizens – not the State itself (in the form of a judge) – are interposed between a defendant and the imposition by the State of the maximum punishment allowed by law. Once the State has specified the facts necessary for the imposition of that punishment, it is the constitutional role of those citizens, not the State, to find those facts. *See Apprendi*, 530 U.S. at 484 ("If a defendant faces punishment beyond that provided by statute when an offense is committed under certain circumstances but not others . . . the defendant should not – at the moment the State is put to proof of those circumstances – be deprived of protections that have, until that point, unquestionably attached"); *Jones*, 526 U.S. at 241 (Sixth Amendment protections extend to any "fact which the State deems so important that it must be either proved or presumed") (internal quotation marks omitted).[4] *See also Apprendi*, 530 U.S. at 498 (Sixth Amendment grounded on the refusal of the "founders of the American Republic . . . to leave [criminal justice] to the State") (Scalia, J., concurring); *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) (Sixth Amendment right of jury trial is an "inestimable safeguard against the . . . compliant, biased, or eccentric judge"). The State's "range of punishment" argument abandons this principle entirely, and therefore must fail.

4. *See also Apprendi*, 530 U.S. at 501 ("if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact – of whatever sort, including the fact of a prior conviction – the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny") (Thomas, J., concurring).

B. The State also attempts to distinguish this case from *Apprendi* on the ground that petitioner's indictment gave him "notice that he might receive a death sentence," while the indictment in *Apprendi* gave the defendant "no means of discerning that he was subject to a sentence enhancement or the grounds upon which the enhancement could rest." Resp. Br. 19-20. It is clear, however, that this purported "deficiency in the New Jersey scheme" (*id.* at 20) played no role in the decision in *Apprendi*. This Court expressly said so, noting that "Apprendi has not here asserted a constitutional claim based on the omission of any reference to sentence enhancement or racial bias in the indictment," and explaining that it therefore did "not address the indictment question separately today." *Apprendi*, 530 U.S. at 477 n.3. *See also id.* (noting that the Sixth Amendment does not "include the Fifth Amendment right to 'presentment or indictment of a Grand Jury' ").

C. Relying on *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), the State also argues that the "aggravating circumstances" in Ariz. Rev. Stat. Ann. § 13-703 are not "elements" of first degree murder, but instead "sentencing factors." Resp. Br. 20-26. *See also* Ala. Br. 22-25. The State concedes that if the identical factors had been incorporated into "the substantive definition of 'capital murder,' " they would be "elements" of the crime to which "the jury trial guarantee obviously attaches." Resp. Br. 25. However, arguing that Arizona has chosen to treat the aggravating circumstances as "sentencing factors," the State contends that they are wholly irrelevant – "a matter of largesse" – for Sixth Amendment purposes. *Id.* at 26.

Apprendi is precisely to the contrary. New Jersey contended there that the racial motivation factor was not an

"element" of the crime, but instead a "sentencing factor." *See Apprendi*, 530 U.S. at 492. This Court held, however, that such "[l]abels do not afford an acceptable answer." *Id.* at 494 (internal quotation marks omitted). Rather, "the relevant inquiry is one not of form, but of effect – does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" *Id.* If so, *Apprendi* teaches, the fact is a "functional equivalent of an element" of the crime (*id.* at 494 n.19), and the Sixth Amendment requires the finding to be made by a jury. *See also Apprendi*, 530 U.S. at 521 ("If a fact is by law the basis for imposing or increasing punishment – for establishing or increasing the prosecution's entitlement – it is an element.") (Thomas, J., concurring).[5]

Apprendi expressly limited the holding in *McMillan* to cases that do not involve the imposition of a sentence more severe than that allowed by the jury's verdict, and suggested that even that narrow holding was subject to future reconsideration. 530 U.S. at 487 n.13. Since there was a "differential in sentence between what Apprendi would have received without the finding of biased purpose and what he could receive with it," the Court held that New Jersey's reliance on *McMillan* was misplaced. *Id.* at 495. The same is

5. Contrary to one *amicus* (Criminal Justice Legal Found. ("CJLF") Br. 10), this "purely functional definition" of "element" is plainly the Court's, not that of the defendant. *See Apprendi*, 530 U.S. at 494 n.19 (describing a circumstance that allows increase in punishment beyond that allowed by jury's verdict as "the functional equivalent of an element of a greater offense than the one covered by the jury's guilty verdict"). As the Court noted in *Apprendi*, this "functional" approach has the added virtue of avoiding embroilment in the "constitutionally novel and elusive distinction between elements and sentencing factors." *Id.* at 494 (internal quotation marks omitted).

true here – there is an obvious differential in sentence between what petitioner could have received under Arizona law without the finding of an aggravating circumstance and what he did receive with it.

D. The State argues that the Sixth Amendment right to jury trial cannot encompass the aggravating factors required under Arizona law for the imposition of a death sentence, since such factors were unknown at the time the Amendment was adopted. Resp. Br. 27. But despite the State's quarrels with petitioner's characterization of the historical record, it does not – and cannot – dispute the essential point: In 1791, the jury's guilty verdict with respect to the crime of capital homicide (as was true for all crimes) included within it all factual findings necessary to allow the imposition of the maximum sentence allowed by law. *Apprendi* teaches that the Sixth Amendment codifies the Framers' contemporary understanding that American citizens would continue to be guaranteed that a jury of their fellow citizens, not a judge, would be required to find whatever facts the establishment of which the State from time to time deemed necessary to allow the imposition of the maximum sentence allowed by law.[6]

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6. Petitioner does not contend that a defendant is entitled under the Sixth Amendment to a jury trial with respect to those facts which may *mitigate* the possibility of the maximum sentence allowed by law. Thus, the suggestion of one *amicus* that the Arizona statutory scheme can be analogized to the practice of "benefit of clergy" (CJLF Br. 3-8) is entirely misplaced. "Benefit of clergy" permitted imposition of *less* than the maximum sentence authorized by the jury verdict; in contrast, Arizona law allows the court to *exceed* the maximum sentence authorized by the jury verdict upon a finding of aggravating circumstances.

This jury trial guarantee does not disappear simply because a State has since 1791 statutorily "narrowed" the group of murder defendants who may be punished by death. Pennsylvania effectively "narrowed" its law in 1794 to provide that not all murders would be punished by death, and to require proof of one or more additional facts – premeditation, use of poison, lying in wait, or murder during the commission of a specified felony – as a prerequisite to capital punishment. *See* Pet. Br. 27. If, as the State suggests, the right to jury trial applies only to the issues that a jury decided in 1791, it would be possible today for Pennsylvania to assign the factual issue of premeditation solely to a judge for decision. But there can be no question that premeditation must, under the Sixth Amendment, be submitted to the jury. The "narrowing" facts that Arizona now requires to be found in order to subject petitioner to the death sentence can receive no different constitutional treatment.

E. We anticipated and answered in our opening brief the argument that Arizona's statutory aggravating circumstances somehow fall outside the Sixth Amendment jury trial guarantee because they were adopted in response to this Court's Eighth Amendment jurisprudence, or because the Eighth Amendment constrains the State's ability to punish all murders with death. *See* Pet. Br. 31-32. But the State expressly foregoes any such contention: "The State has never contended that its Eighth Amendment motivations in enacting the statute insulate it from attack on Sixth Amendment grounds." Resp. Br. 24.

The State thus effectively concedes that the Arizona capital punishment statutes are subject to the same constitutional analysis as would obtain if State law instead provided that first degree murder was punishable by fifty

years in prison, and specified that the prison sentence could be increased to life upon proof of one or more of precisely the same aggravating factors specified in Ariz. Rev. Stat. Ann. § 13-703. Since *Apprendi* would clearly guarantee a jury trial as to the aggravating circumstances under such a statute, no different result is possible here.

II. THE DOCTRINE OF *STARE DECISIS* CANNOT PRESERVE *WALTON* IN LIGHT OF *APPRENDI*.

While conceding the "tension between the language in *Apprendi* and the capital sentencing statute upheld in *Walton*" (Resp. Br. at 27), the State urges that the doctrine of *stare decisis* nonetheless requires continued adherence to *Walton*. *Id.* at 32-33. *See also* CJLF Br. 14-27; Ala. Br. 7-10. But "[*s*]*tare decisis* is not an inexorable command; rather, it is a principle of policy and not a mechanical formula." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (internal quotation marks omitted). The policy applies with least force in "constitutional cases, because in such cases correction through legislative action is practically impossible." *Id.* (internal quotation marks omitted). Thus, this Court has never hesitated to overturn constitutional decisions that no longer withstand scrutiny. *See id.* at 828-30 & n.1 (listing thirty-three constitutional decisions that had been overruled in whole or in part in the twenty Terms preceding *Payne* and noting that *Payne* overruled two more).

The State argues that continued adherence to *Walton* is appropriate because there is no evidence that the denial of the right to a jury with respect to the finding of aggravating circumstances has "made the death penalty process unfair or unreliable." Resp. Br. 33. This argument, however, is wholly irrelevant to Sixth Amendment analysis. As this Court has

noted, "[a] criminal process which was fair and equitable but used no juries is easy to imagine." *Duncan*, 391 U.S. at 149 n.14. But rather than simply serving efficiency and fairness, "the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power – a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges." *Id.* at 156. Given this clear constitutional policy, a criminal defendant's right to jury trial cannot be abrogated simply on the assumption that judges perform the fact-finding function as well as or better than juries.

Nor is this a case where purported reliance justifies continued adherence to a now unsupportable decision. "Considerations in favor of *stare decisis* are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases . . . involving procedural and evidentiary rules." *Payne*, 501 U.S. at 828 (citations omitted). Only a small minority of the States have adopted capital punishment statutes which exclude the jury from the finding of aggravating circumstances. *See* Pet. Br. 37-38 & nn.35, 36. Even in those States, the rule that petitioner urges would overturn no convictions. At most, what the State and its *amici* fear are further sentencing proceedings (and, if the State's position regarding retroactivity is accurate, such proceedings would be required only for defendants whose cases are on direct appeal). While not trivial, this is hardly akin to the reliance concerns that informed such decisions as *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), or *Dickerson v. United States*, 530 U.S. 428 (2000).

Finally, the State and its *amici* urge that *Walton* was not inconsistent with a number of previous decisions of this Court. *See* Resp. Br. 31-33; Ala. Br. 8-10 & n.6; CJLF Br. 14-17. But this of course may be said about many overruled decisions of this Court. In any event, we do not claim that the difficulty with *Walton* is its inconsistency with its immediate predecessors; rather, the fatal flaw with *Walton* is that it is contrary to the Court's *later* decision in *Apprendi*. When "intervening development of the law" has "removed or weakened the conceptual underpinnings from the prior decision, or where the later law has rendered the decision irreconcilable with competing legal doctrines or policies, the Court has not hesitated to overrule an earlier decision." *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989) (citations omitted). In light of *Apprendi* and *Jones*, this is precisely such a case.[7]

7. Contrary to the State (Resp. Br. 32), it is not necessary for the Court to confront today the more difficult question of the effect of *Apprendi* on the continued vitality of *Cabana v. Bullock*, 474 U.S. 376 (1986). While *Apprendi* involves the finding of specific facts expressly required by state statutes to allow imposition of the maximum penalty allowed by law – a determination historically the province of a jury – *Cabana* starts from the premise that a jury has already found all facts necessary under State law for the imposition of capital punishment and instead involves a function traditionally performed by the Court – proportionality review. *See Cabana*, 474 U.S. at 385 (describing *Enmund/Tison* review as a form of proportionality review). *See, e.g., Howard v. Fleming*, 191 U.S. 126, 136 (1903) (holding ten year sentence for conspiracy not cruel "for an offense of the nature disclosed by the testimony"); *Solem v. Helm*, 463 U.S. 277 (1983) (holding that proportionality review involves an examination by the court of the circumstances of defendant's crime). If, as petitioner claims, his sentence of death was improperly imposed because he was denied a jury trial regarding the existence of a statutory aggravating circumstance, the *Cabana* holding will be

(Cont'd)

III. THIS COURT SHOULD NOT CONSIDER THE STATE'S HARMLESS ERROR ARGUMENT.

The State contends that even if the Arizona statutory scheme improperly removed from the jury the finding of facts necessary for the imposition of petitioner's death sentence, this Court should affirm the sentence since the error was "harmless." Resp. Br. 33-36. The State never made this argument below, nor did the Arizona Supreme Court consider it. Thus, it is questionable that this argument has been preserved for review. *See Amadeo v. Zant*, 486 U.S. 214, 228 n.6 (1988) (alternative ground for affirmance must be properly raised below).[8] But even if the issue has not been

(Cont'd)
implicated in this case only if (a) the State develops procedures for findings of aggravating circumstances by the jury; (b) the State seeks such further jury proceedings in petitioner's case; and (c) in those proceedings, the State decides (contrary to the practice in other States) to remove from the jury the opportunity to make *Enmund/Tison* findings. *Cf.* Miss. Code Ann. § 99-19-101(7) (West, WESTLAW through 2001 2d Ext. Legis. Sess.) (requiring jury to make *Enmund/Tison* findings). If that day arrives, it will be time enough then to consider the effect of *Apprendi* on *Cabana*.

8. Although this Court does not appear to have expressly determined whether a harmless error argument can be waived, most courts of appeal have so held. *See, e.g., United States v. Varela-Rivera*, 279 F.3d 1174, 1180 (9th Cir. 2002); *United States v. Torrez-Ortega*, 184 F.3d 1128, 1136 (10th Cir. 1999); *United States v. McLaughlin*, 126 F.3d 130, 135 (3d Cir. 1997); *United States v. Rose*, 104 F.3d 1408, 1414 (1st Cir. 1997); *United States v. Montgomery*, 100 F.3d 1404, 1407 (8th Cir. 1996); *United States v. Giovannetti*, 928 F.2d 225, 226 (7th Cir. 1991). *Cf. United States v. Pryce*, 938 F.2d 1343 (D.C. Cir. 1991) (while harmless error argument can be waived, court of appeals has discretion to undertake harmless error analysis where record is "short and straightforward").

waived, this Court's settled practice is not to consider in the first instance harmless error claims not ruled upon by the courts below. *See Neder v. United States*, 527 U.S. 1, 25 (1999); *Carella v. California*, 491 U.S. 263, 266 (1989); *Sandstrom v. Montana*, 442 U.S. 510, 526-27 (1979).

This case provides no occasion for departure from the Court's practice. As an initial matter, the State's argument would require the Court to determine whether the Arizona statute's categorical denial of the right to jury trial with respect to aggravating circumstances could ever be harmless error. *See Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991) (unlike an "error in the trial process itself," such as the admission of inadmissible evidence, "structural defects in the constitution of the trial mechanism" cannot be harmless). *Cf. Rose v. Clark*, 478 U.S. 570, 578 (1986) (refusing to find harmless error where jury trial right has been "altogether denied").

More importantly, the State's argument would require the Court to engage in a difficult process of applying state law to the facts of this case. The Arizona Supreme Court has repeatedly held that the pecuniary gain aggravator is *not* automatically established by simultaneous convictions for first degree felony murder and robbery. Rather, the State must also prove that the motivation for the murder, as opposed to the robbery, was pecuniary gain. Thus, under Arizona law,

> [T]he State must prove additional facts to prove the aggravating circumstance of pecuniary gain once it has proved the robbery. . . . To prove robbery, the state must show a *taking* of property from the victim; to prove pecuniary gain, the state must show the actor's *motivation* was the expectation of pecuniary gain. Proving a taking in a robbery does not necessarily prove the motivation for a murder. . . .

State v. Carriger, 692 P.2d 991, 1010 (Ariz. 1984) (emphases in original) (citations omitted). *See also State v. Sansing*, 26 P.3d 1118, 1124 (Ariz. 2001), *petition for cert. filed*, No. 01-7837 (U.S. Jan. 4, 2002) (holding that "murder committed in the context of a robbery or burglary is not per se motivated by pecuniary gain"). Arizona law requires a "highly fact-intensive inquiry" to establish the required link between a murder and expected pecuniary gain. *Id.* at 1125.

The Arizona Supreme Court pointedly noted that the trial record in this case "provided almost nothing about *why* [the victim] was killed." Pet. App. 29a (emphasis added). Therefore, the State's argument that the jury impliedly found that the murder was motivated by pecuniary gain is directly contrary to the opinion below.[9] This is thus simply not an appropriate case for this Court to affirm the judgment below on the basis of harmless error. *See Chapman v. California*, 386 U.S. 18, 24 (1967) (reviewing court must declare error "harmless beyond a reasonable doubt").[10]

9. The State stresses the Arizona Supreme Court's statement that the killing was "for no other comprehensible reason than to facilitate the robbery." Resp. Br. 35 (*quoting* Pet. App. 34a). This statement, however, appears in a discussion of the facts that the trial judge found on the basis of the evidence presented at the *sentencing hearing* as well as the trial (*see* Pet. App. 33a-34a), and therefore provides no basis for an argument as to what the jury necessarily found on the basis of the trial evidence.

10. Of course, nothing in the Constitution requires that Arizona courts conduct a harmless error analysis, even assuming that the State has not waived the argument. *See Clemons*, 494 U.S. at 754.

CONCLUSION

The judgment of the Supreme Court of Arizona should be reversed insofar as it affirms the death sentence imposed on petitioner.

Respectfully submitted,

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